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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

PHILIP RASTELLI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	
United States Constitution	
Amendment VI	2
Amendment XIV	2
Question Presented	2
Statement	3
POINT I—The New York State Court of Appeals disregarded the petitioner's Sixth Amendment right to confront the witnesses against him and in so doing disregarded the prior rulings of this Court and misapplied *Dutton* v. *Evans*, 400 U.S. 74 to the facts in the instant case	5
Conclusion	8
Appendix "A"	9

CASES CITED

Barber v. *Page*, 390 U.S. 719	6
Brookhart v. *Janice*, 384 U.S. 1	6
Douglas v. *Alabama*, 380 U.S. 415	6
Dutton v. *Evans*, 400 U.S. 74	3, 5, 7, 8
Pointer v. *Texas*, 380 U.S. 400	6
Roberts v. *Russell*, 392 U.S. 293	6

PAGE

UNITED STATES CONSTITUTION

Sixth Amendment 2, 5, 6, 7

Fourteenth Amendment 2

STATUTES CITED

28 U.S.C. Sec. 1257(3) 2

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Philip Rastelli, hereby petitions for a Writ of Certiorari to review the decision of the Court of Appeals of the State of New York which affirmed a judgment of the County Court, County of Suffolk, convicting the petitioner of the crimes of criminal usury, seven counts, and conspiracy, one count, and imposing a jail sentence of zero to four years on each of the seven counts of criminal usury and one year for the crime of conspiracy all said prison terms to run concurrently to each other.

Opinions Below

The opinion of the New York State Court of Appeals has not as yet been reported, but a copy of that decision is annexed hereto as Appendix A. The Appellate Division, Second Department, affirmed the decision which is reported in 43 A.D. 2d, 699.

Jurisdiction

The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C., Section 1257(3). It is alleged that petitioner's Sixth and Fourteenth Amendment rights to a fair trial were unlawfully interfered with.

Constitutional Provisions Involved

United States Constitution
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Question Presented

The New York State Court of Appeals disregarded the petitioner's Sixth Amendment right to confront the wit-

nesses against him and in so doing disregarded the prior rulings of this Court and misapplied *Dutton* v. *Evans*, 400 U.S. 74 to the facts in the instant case.

Statement

Petitioner, Philip Rastelli, was tried along with four co-defendants Tom Sala, Joseph Lombardi, Anthony D'Gregorio and Frank Andosca. Each of the defendants was convicted of seven counts of criminal usury and one misdemeanor count of conspiracy on an indictment that charged sixteen crimes. As indicated above, petitioner's sentence was zero to four years on each of the usury counts and one year on the conspiracy count, all said terms to run concurrently to each other.

The case against the petitioner was created by one William Murray, a bail bondsman who had lost his state privilege to so act because of his own criminal conduct including larcenies, perjury and even the alleged forgery of a County Court jurist's signature. When Murray's dizzy world began to collapse he tried to save his own neck. He met with the Chief Deputy Prosecutor and Chief of the Rackets Bureau in the Suffolk County prosecutor's office. Suddenly and miraculously he became a police agent to solve a purported usurious loan operation in Suffolk County. Murray knew his scheme to be successful, had to have a big name. He chose petitioner, Rastelli, whom the District Attorney at the trial stated was the biggest crime figure in the Borough of Brooklyn, although this was a prosecution in Suffolk County. The prosecution, to bolster the testimony of William Murray, could not offer one shred of evidence either direct or circumstantial that would link Philip Rastelli with this alleged conspiracy. None of the other witnesses ever saw or met Mr. Rastelli. During their investigation, the police department had occasion to place a tape recorder and transmitting device on Murray.

Through this technique they were able to obtain conversations between the witness and other co-defendants. The tapes, cassettes and transcripts were introduced into evidence. These tapes never once contained even a single word uttered by the petitioner. The tapes did, however, contain several statements made by co-defendants which in the mind of Murray implicated the petitioner. It is clear, however, that these statements were made by individuals who had a clear motive to lie and to advance their own position and prestige by dropping the name of the petitioner Philip Rastelli. This is the only evidence that linked the petitioner to this so-called conspiracy. The witness Murray claimed to have one meeting with the petitioner which, interestingly enough, was not recorded. The witness did not remember the name or location of the site of this meeting nor could he say that he ever received any money from the petitioner. In essence, Murray drew the petitioner into his story merely to serve his own purposes and because the co-defendants were all too willing to use the petitioner's name to advance their own interests. There was not a scintilla of evidence to support Murray's theory that the petitioner was in any way connected to the others.

The petitioner was obviously convicted on the testimony contained in the tapes, cassettes and transcripts wherein co-defendants implicated him in the conspiracy by Murray's words. The petitioner did not have any opportunity to confront these witnesses nor subject evidence to the scrutiny of cross-examination which clearly would have shown that such evidence was totally without credibility.

Furthermore, the petitioner was denied his right to confront the witnesses against him and to have a fair trial simply because his name had a certain amount of notoriety and was used by co-defendants to further their own ambitions. The Court of Appeals of the State of New York considered these constitutional questions concerning the

denial of his right to confrontation and a fair trial and rejected this argument. The New York State Court of Appeals was of the opinion that the principle expressed by this Court in *Dutton* v. *Evans,* 400 U.S. 74, was applicable to the instant case. It is this issue that is sought to be presented to this Court.

POINT I

The New York State Court of Appeals disregarded the petitioner's Sixth Amendment right to confront the witnesses against him and in so doing disregarded the prior rulings of this Court and misapplied *Dutton* v. *Evans,* 400 U.S. 74, to the facts in the instant case.

The petitioner in the instant case was convicted of the crimes of criminal usury and conspiracy solely upon the extra-judicial statements of co-defendants introduced into evidence on tape and in transcript form. The petitioner was not afforded any opportunity to cross-examine these co-defendants. The only other evidence against the petitioner was the testimony of one William Murray who in no way was able to link the petitioner with the conspiracy other than to state the petitioner was present at one meeting with some of the co-conspirators. However, the record reflects that this meeting did not take place in the prosecution's county nor was there any evidence showing that any agreement was ever entered into between the petitioner and the co-defendants. After this one meeting and out of the presence of the petitioner, Mr. Murray was given part of a loan that led to a charge of criminal usury. On cross-examination of the witness Murray was, however, shown that the petitioner did not give any money to the witness nor in any way indicate that he was part of a so-called conspiracy. The petitioner could not in any way be linked to the loan of money to Murray. As indicated above, the sole link between the petitioner and the criminal

charges made against him was the name dropping of his name by some of the co-defendants. Co-defendants in taped conversations made references to an individual who the prosecution alleged was the petitioner. These statements supposedly indicated that the petitioner was the money behind the usurious loans. It is emphasized, however, that nothing but these tapes linked the petitioner with the crimes. Obviously the co-defendants at the time these statements were made had a clear motive to lie. If they were engaged in a usurious loan ring as alleged would it not suit their purposes to drop the name of an individual like the petitioner for whatever effect it might have on the victim.

It is the petitioner's contention that the introduction of these tapes and transcripts denied him his Sixth Amendment right to confront the witnesses against him as is clearly mandated by this Court. (*Pointer* v. *Texas,* 380 U.S. 400; see also *Douglas* v. *Alabama,* 380 U.S 415; *Brookhart* v. *Janice,* 384 U.S. 1; *Barber* v. *Page,* 390 U.S. 719; *Roberts* v. *Russell,* 392 U.S. 293). This Court has continually and consistently held that a defendant must be afforded the right to confront the witnesses against him or this Court will reverse the state court conviction. (See *Pointer* v. *Texas, supra; Douglas* v. *Alabama, supra; Brookhart* v. *Janice, supra; Barber* v. *Page, supra; Roberts* v. *Russell, supra*).

In conflict with the above cases the New York State Court of Appeals in its decision held that the petitioner was properly denied his right to confrontation relying upon this Court's holding in *Dutton* v. *Evans,* 400 U.S. 74. It is respectfully submitted that the use of this Court's holding in *Dutton* v. *Evans* to circumvent a basic fundamental right of confrontation is to distort the holding of that case. The New York State Court of Appeals has improperly interpreted, applied and extended this Court's holding in *Dutton* v. *Evans, supra.* Petitioner submits that

the holding relied upon by the state Court is a narrow holding that should not have been applied to the instant case. As the majority in *Dutton* v. *Evans* at page 86, *supra*, stated:

> "It seems apparent that the Sixth Amendment confrontation clause and the evidentiary hearsay rule stem from the same roots, but this Court has never equated the two and we decline to do so now. *We confine ourselves instead to deciding the case before us.*" (Emphasis supplied)

The language of the Court then indicates that the holding of the Court was not to be interpreted as a broad endorsement of a state Court's avoidance of the Confrontation Clause of the Sixth Amendment. The ruling of the Court in *Dutton* v. *Evans, supra* should be limited on its facts to the case presented. In point of fact, the instant case is clearly distinguished from the *Evans* case. In *Evans* the Court pointed out that the case did not involve evidence in any sense crucial or devastating. It did not involve the use by the prosecution of transcripts. It did not involve a joint trial or the wholesale denial of cross-examination. In the instant case all of the above factors were present. The evidence was not only critical or devastating, but was in fact the only evidence linking the petitioner with the crime. Not only transcripts, but tape recordings of the co-defendants' statements were introduced. All of the co-defendants were put on trial together and finally there was in fact no cross-examination of the co-defendants. All of the above clearly indicate that this Court should review the petitioner's state Court conviction because the state Court has decided a substantial Federal question arising under the Constitution and has rendered an erroneous decision on such question. Furthermore, even if the state Court correctly relied upon *Dutton* v. *Evans* it is submitted that the decision in that case must be reviewed by this Court because it does not clearly define by a clear-

cut majority of the Court exactly where the right to confrontation ends and the evidentiary hearsay rule begins. In an area dealing with the basic and fundamental right to confrontation such a situation must be remedied. To quote the dissent in *Dutton* v. *Evans, supra,* at page 107:

> "Indeed if that opinion meant what it says it would come very close to establishing in reverse the very equation it seeks to avoid—any equation that would give any exception to a state hearsay rule a permanent niche in the Constitution in the form of an exception to the confrontation clause as well."

Clearly the fears of the dissent in the above case have come to pass and it is now time for this Court to speak clearly on this issue and set forth a definitive ruling on this basic issue of the right to confront witnesses appearing against an individual. This rule would have broad application and an impact on defendants in all state Courts. For all of the above reasons, it is most respectfully submitted that certiorari should be granted in the instant case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A, Opinion, New York Court of Appeals.

STATE OF NEW YORK
COURT OF APPEALS

2 No. 260

THE PEOPLE &c.,
Respondent,

vs.

PHILIP RASTELLI,
Appellant.

This opinion is uncorrected and subject to revision before publication in the New York Reports.

JASEN, J.:

Appellant Philip Rastelli was charged with organizing and financing a criminal usury enterprise in Suffolk County, while his four codefendants and coconspirators, who are not involved in this appeal, committed the substantive crimes. The People's case centered around William Murray, a former bail bondsman who himself was separately charged with larceny, forgery and perjury for acts which were not connected with these alleged usurious loan transactions.

Murray testified that in September, 1970 he needed money to prevent a foreclosure on his home and to meet certain insurance premium payments. He, therefore, sought a loan for $5,000 from codefendant Joe Lombardi. Lombardi could not produce that amount himself, but he telephoned codefendants Frank Andosca and Tony DiGregario, who arranged to have codefendant Thomas

Sala make a partial loan of $1,500. When Sala presented Murray with the $1,500, he explained that the interest rate would be 3 percent of the $5,000, or $150, per week. Sala stated that these weekly payments were only interest and would not reduce the loan principal, and that the principal had to be repaid in units of $500. Murray signed a promissory note for the $1,500, but the payee and the interest rate were left blank. As security for the loan, Murray signed the back of his automobile registration and gave it to Sala. Arrangements were made to deliver the remaining $3,500 three days later.

On the day agreed upon, Sala drove Murray and Lombardi to a night club in Queens. There Murray was introduced to Andosca and "Rusty" Rastelli, the appellant herein. Rastelli revealed that DiGregario had spoken to him about a loan to Murray and recommended Murray highly. Andosca asked Murray if Sala had explained what payments would have to be made. Appellant, referring to the automobile registration, told Murray that there was no need for collateral and that these papers would be returned to him. Appellant later took an envelope from his coat pocket, stated it was the remainder of the loan, and handed it to Andosca, who turned it over to Sala. This meeting, which had lasted nearly three hours, ended when appellant stated "[l]et's give the kid his money and get out of here. It's getting late." Once outside, Sala handed Murray the envelope which, upon later inspection, proved to contain $3,500 in cash.

Thereafter, for a period of four or five months, Murray faithfully made his weekly payments of $150. When the weekly payments became more than he could handle, he sought out Lombardi for some relief. Murray was told that he would "look good as far as the rest of the boys are concerned" if he referred potential borrowers to Lombardi and the others. Murray was informed that these loans

would be made at 4 percent weekly interest, one percent to be split between Lombardi and DiGregorio, one percent split between Andosco and Sala, and two percent to Rastelli "because it's his money." Murray first put Dan Richert in touch with Lombardi. Richert received a loan of $1,000 at 4 percent per week. In January, 1971 Murray recommended Harold and Arthur Scott to Lombardi, Andosca, DiGregorio and Sala. The Scotts were initially loaned $2,000 at 4 percent per week, and later an additional $1,000 at 3 percent. That same month he also recommended Murray Bogatin. Bogatin borrowed $3,000 at 4 percent weekly. In February, 1971 Murray recommended Richard Brightman for a loan. He borrowed $1,000, also at 4 percent weekly. Additionally, Louis Brightback testified that he borrowed $2,000 from Sala at the same rate. Similarly James Lemanski testified that he borrowed $500 from Lombardi at 4 percent weekly.

During the months of March to July, 1971 Suffolk County detectives equipped Murray with a tape recorder and later a transmitting device. Tapes and transcripts which were made of conversations between Murray and the codefendants contained numerous statements by all the codefendants, implicating not only each of them but also Rastelli. No tapes or transcripts were made of any conversations Murray had with Rastelli.

Upon this evidence, the appellant was convicted of the crimes of conspiracy in the third degree and seven felony counts of criminal usury.

On this appeal, appellant contends that the evidence was insufficient as a matter of law to sustain his conviction. The evidence at trial, believed by the jury, established appellant as the organizer and financier of the enterprise. Appellant was not only named by his coconspirators in the course of and in furtherance of the conspiracy, but he was also shown to be a direct participant in at least the loan to Murray. We conclude that the evidence was sufficient as a matter of

law to sustain the conviction for conspiracy and usury (cf., *People* v. *Colascione*, 22 N Y 2d 65, 74-75), and demonstrates the required nexus between the appellant's acts, the conspiracy and the substantive offenses.

The other principal issue raised in this appeal is whether appellant was denied his Sixth Amendment right of confrontation with respect to Murray's testimony as to conversations Murray had with appellant's codefendants.

It has long been the law in New York that the acts and declarations of one coconspirator which occur while the conspiracy is in progress and which are in furtherance of the common scheme are admissible and provable as to all other coconspirators as part of the *res gestae* and as a recognized exception to the hearsay rule. (*People* v. *Luciano*, 277 N. Y. 348, 358; *People* v. *McKane*, 143 N. Y. 455, 470; see also, McCormick, Handbook of the Law of Evidence [2d ed.], § 267, p. 645; Richardson, Evidence [10th ed.], § 244, p. 214.) Nevertheless, the appellant contends, with particular reliance upon *Bruton* v. *United States* (391 U. S. 123), that this rule denies him the opportunity to confront his coconspirators who made the statements and is, therefore, violative of the Sixth Amendment.

In *Bruton*, the Supreme Court held that, in a joint trial, the admission into evidence of a codefendant's confession implicating another codefendant violated that other codefendant's right of cross-examination secured by the confrontation clause of the Sixth Amendment. As to the codefendant who was implicated by the confession in that case, the confession challenged was clearly hearsay. In *Bruton*, however, the Supreme Court specifically stated that it was not expressing any view as to recognized exceptions to the hearsay rule. (*Bruton* v. *United States*, *supra*, 391 U. S. at 128, n. 3.) More recently, in *Dutton* v. *Evans* (400 U. S. 74), that court did pass on a question similar to the one now before us. *Dutton* involved a Georgia

statute, broader in scope than our coconspirator rule, specifically permitting, once the fact of conspiracy had been proved, a declaration by one of the coconspirators during the pendency of the criminal project to be admitted against all coconspirators. The Supreme Court held that the Georgia statute did not violate the confrontation clause. In upholding the constitutional validity of the Georgia statute, the plurality opinion of the Supreme Court also indicated that it did "not question the validity of the co-conspirator exception applied in the federal courts." (*Id.*, at p. 80.) This general principal would seem to apply here.

The order of the Appellate Division should be affirmed.

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Order affirmed. Opinion by Jasen, J. All concur.

Decided June 16, 1975